

*Decision folder*



0000023242

Arizona Corporation Commission  
**BEFORE THE ARIZONA CORPORATION COMMISSION**  
**DOCKETED**

DEC 28 2001

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

DOCKETED BY	<i>[Signature]</i>
-------------	--------------------

IN THE MATTER OF U. S. WEST  
COMMUNICATIONS, INC.'S COMPLIANCE  
WITH SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

DECISION NO. 64300

**ORDER**

Open Meeting  
December 20, 2001  
Phoenix, Arizona

**BY THE COMMISSION:**

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

**FINDINGS OF FACT**

1. On March 9, 2001, the Commission issued Decision No. 63419, conditionally approving Qwest's compliance with Section 271 of the Federal Telecommunications Act of 1996 ("1996 Act") Checklist Item No. 3 – Poles, Ducts, Conduits and Rights-of-Way.

2. The 1996 Act added Section 271 to the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that must be met in order for the Federal Communications Commission ("FCC") to allow a Bell Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly known as US WEST Communications, Inc. ("US WEST")<sup>1</sup> to provide in-region interLATA services. The conditions described in Section 271 are intended to determine the extent to which local phone service is open to competition.

3. Section 271 (c)(2)(B) sets forth a fourteen point competitive checklist which specifies the access and interconnection a BOC must provide to other telecommunications carriers in order to satisfy the requirements of Section 271. Section 271(c)(2)(B)(iii) requires a BOC desiring to make an application pursuant to Section 271 to provide or offer to provide "[n]ondiscriminatory access to

<sup>1</sup> For purposes of this Order, all references to US WEST have been changed to Qwest.

1 the poles, ducts, conduits, and rights of way owned or controlled by the [BOC] at just and reasonable  
2 rates in accordance with the requirements of section 224."

3 4. In Decision No. 63419, the Commission found that all issues raised in the Arizona  
4 Workshops were resolved and that Qwest met the requirements of Checklist Item No. 3, subject to  
5 Qwest updating its SGAT to incorporate language agreed upon by the parties in other region  
6 workshops and resolution by the Hearing Division of how to treat issues arising in other jurisdiction  
7 after the record in Arizona has closed.

8 5. On March 26, 2001, the Hearing Division issued a Procedural Order setting forth  
9 procedures for supplementing the record in Arizona for impasse issues that arise in other jurisdictions  
10 after the Workshop has concluded in Arizona. Pursuant to the March 26, 2001, Procedural Order a  
11 party may request to supplement the record in Arizona by filing a brief within 10 business days from  
12 the date the issue is first declared at impasse in another jurisdiction. Other parties file replies to the  
13 request within 7 business days, and Staff files a report, including its procedural and substantive  
14 recommendations for the resolution of the dispute.

15 6. On April 9, 2001, AT&T Communications of the Mountain States ("AT&T") and  
16 WorldCom, Inc. ("MCIW") (collectively "Joint Intervenors") filed a Request to Supplement the  
17 Record Regarding Checklist Items Nos. 3, 7, and 10 with disputed issues raised in other region  
18 workshops.

19 7. On April 17, 2001, Qwest filed a response to AT&T's and MCIW's Request to  
20 Supplement the Record Regarding Checklist Items Nos. 3, 7, and 10.

21 8. On October 12, 2001, Qwest filed a Supplemental Response to AT&T's and MCIW's  
22 Request to Supplement the Record Regarding Checklist Items Nos. 3, 7, and 10.

23 9. On November 5, 2001, Commission Staff filed its Supplemental Report on Checklist  
24 Item No. 3.

25 10. On November 15, 2001, Qwest filed Comments on Staff's Supplemental Report on  
26 Qwest's Compliance with Checklist Item No. 3.

27 11. The Joint Intervenors identified five issues that had gone to impasse in other  
28 jurisdictions and which they sought to have resolved in Arizona.

12. The first supplemental impasse issue is whether Qwest's SGAT definition of "Ownership and Control" is appropriate and consistent with the law.

13. The Joint Intervenor's argue that under the 1996 Act and FCC Orders, the ownership and control analysis that must be conducted under state law is to determine Qwest's ownership or control to afford CLECs access to its right-of-way, easement or other interest in property, and not, as Qwest suggests, to determine Qwest's legal right "to convey an interest" in property. They assert that the ability to afford access based upon an ownership and control analysis may not rise to the level of "conveying an interest." The Joint Intervenor's recommend that SGAT Section 10.8.1.5 be revised as follows:

The phrase "ownership or control to do so" means the legal right, as a matter of state law, to convey an interest in real or personal property or to afford the access to poles, ducts, conduits and rights-of-way contemplated by the Act.

14. Qwest proposes that its Arizona SGAT Section 10.8.1.5 reflects the Facilitator's recommendation in the Multi-State proceeding as follows:

The phrase "ownership or control to do so" means the legal right, as a matter of state law, to (i) convey an interest in real or personal property, or (ii) afford access to third parties as may be provided by the landowner to Qwest through express or implied agreements, or through Applicable Rules as defined in this Agreement.

15. Staff finds the Multi-State language to be acceptable and recommends that it be adopted in Arizona. Further, to the extent there are other conforming amendments that need to be made to other provisions of SGAT Section 10, Staff recommends that Qwest be required to include those as well and submit all revised SGAT language for review by the parties.

16. We agree with Staff, Qwest's proposed definition of "ownership or control to do so" addresses the CLECs' concerns and should be adopted.

17. The second supplemental impasse issue is whether Qwest's SGAT definition of "Rights of Way" ("ROW") is consistent with FCC Orders.

18. Qwest's proposed SGAT Section 10.8.1.3 provides:

ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such

property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings, within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designed for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

19. The Joint Intervenor argues that ROW as contemplated by the 1996 Act and the FCC is not limited to "real property interests" as Qwest defines the term. Furthermore, they assert, Qwest's definition of ROW in an Multi- Dwelling Unit ("MDU") is not consistent with the FCC's *MTE Order*.<sup>2</sup>

20. Staff recommends a slight modification to the language Qwest proposed in the Multi-State proceeding (Staff's recommendation is in bold):

10.8.1.3 Rights of Way (ROW) – Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above, along or through public or private property or enter multi-unit buildings.

10.8.1.3.1 ROW means **access to private property owned or controlled by Qwest**, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries or the pathway are clearly defined either by written specification or unambiguous physical demarcation.

21. In its November 15, 2001 Comments to Staff's Supplemental Report, Qwest states that Staff's proposed modification could include all property owned or controlled by Qwest, including ladders, trucks, signage and Qwest offices. Qwest asserts that in its *MTE Order*, the FCC's definition does not include outright ownership of personal (as opposed to real) property.

<sup>2</sup> First Report and Order and further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, Promotion of Competitive Networks in Local Telecommunications Markets, WT Dkt. No. 99-217, CC Dkt Nos. 96-98, 88-57, FCC 00-366 (rel. Oct. 25, 2000)

1           22. In its *MTE Order*, ¶ 76, the FCC states that "rights-of-way in buildings means, at a  
2 minimum, defined pathways that are being used or have been specifically identified for use as part of  
3 a utility's transmission and distribution network." And further, "a right-of-way exists within the  
4 meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically  
5 designated for use by a utility as part of its transmission and distribution network and (2) the  
6 boundaries of that pathway are clearly defined, either by written specification or by an unambiguous  
7 physical demarcation." The FCC's definition does not limit the concept of right-of-way to real  
8 property. It does state that it is a defined pathway. This concept is reflected in Staff's proposed  
9 language. Qwest's concern that Staff's language may give access to Qwest property such as "ladders,  
10 trucks, signage and Qwest offices," appears strained, and Qwest has not explained how these items  
11 could be seen as part of a defined pathway. Personal property that is part of a pathway and  
12 designated or used in the transportation and distribution network would be part of the right-of-way.  
13 We believe Staff's proposed language accurately captures the intent of the FCC Order, and should be  
14 adopted. Qwest should revise its SGAT accordingly.

15           23. The third supplemental impasse issue is whether Qwest's conditions under which it  
16 will provide CLECs with access to agreements granting Rights-of-Way are contrary to law or a  
17 barrier to entry.

18           24. The Joint Intervenors argue that Qwest's proposal that it will provide a copy of any  
19 ROW agreement in its possession that has not been recorded only after a CLEC has obtained consent  
20 of the landowner to the disclosure of the ROW agreement is not required by law and is inconsistent  
21 with sound public policy. They argue the consent requirement creates unreasonable costs and  
22 imposes significant delays on CLEC access to ROW and provisioning of service using ROW.

23           25. On March 5, 2001, Qwest submitted a proposal in the subloop workshop that permits  
24 CLECs to obtain MDU agreements (with landowner consent) so long as the CLEC uses the  
25 agreements to make certain Checklist Item No. 3 subloop determinations and does not disclose the  
26 agreements to its marketing, sales, or product management personnel.

27           26. Staff believes that requiring CLECs to obtain approval of the landowner in all  
28 instances before the CLEC may obtain a copy of the underlying right of way or other landowner

1 agreement is an unreasonable burden on the CLEC. Staff recommends that Qwest should eliminate  
 2 the requirement for prior landowner approval before disclosure of underlying landowner/right-of-way  
 3 agreements.

4 27. In its November 15, 2001 Comments, Qwest asserts that Staff's concerns are  
 5 misplaced given that landowner consent is only one of the two options Qwest proposed for CLECs  
 6 desiring to review non-recorded third-party MDU agreements. Qwest explains that if a CLEC does  
 7 not wish to execute the Consent to Disclosure form, the CLEC can agree to indemnify Qwest in the  
 8 event of any legal action arising out of the disclosure. If the CLEC chooses this option, it is not  
 9 required to obtain property owner consent. Qwest states that this is the solution the Multi-State  
 10 Facilitator adopted. Qwest states that it has added a third option as well, which permits CLECs to  
 11 enter into a protective order. Qwest's proposed SGAT language follows:

12  
 13 10.8.2.27 For purposes of permitting CLEC to determine whether  
 14 Qwest has ownership or control over duct/conduit or ROW within a  
 15 specific multi-dwelling unit, if CLEC request a copy of an agreement  
 16 between Qwest and the owner of a specific multi-dwelling unit that grants  
 Qwest access to the multi-dwelling unit, Qwest will provide the agreement  
 to CLEC pursuant to the terms of this Section. CLEC will submit a  
 completed Attachment 1.A from Exhibit D that identifies a specific multi-  
 unit dwelling or route for each agreement.

17 10.8.2.27.1 Upon receipt of a completed Attachment 1.A, Qwest will  
 18 prepare and return an MDU information matrix, within ten (10) days,  
 19 which will identify (a) the owner of the multi-dwelling unit as reflected in  
 20 Qwest's records, and (b) whether or not Qwest has a copy of an agreement  
 21 that provides Qwest access to the multi-dwelling unit in its possession.  
 Qwest makes no representations or warranties regarding the accuracy of  
 its records, and CLEC acknowledges that the original property owner may  
 not be the current owner of the property.

22 10.8.2.27.2 Qwest grants a limited waiver of any confidentiality rights  
 23 it may have with regards to the content of the agreement, subject to the  
 24 terms and conditions in Section 10.8.2.27.3 and the Consent to Disclosure  
 25 form. Qwest will provide to CLEC a copy of an agreement listed in the  
 26 MDU information matrix that has not been publicly recorded after CLEC  
 27 obtains authorization for such disclosure from the third party owner(s) of  
 the real property at issue by presenting to Qwest an executed version of  
 the Consent to Disclosure form that is included in Attachment 4 to Exhibit  
 D of this Agreement. In lieu of submission of the Consent to Disclosure  
 form, CLEC must comply with the indemnification requirements in  
 section 10.8.4.1.3 or must agree to be bound by the terms and conditions  
 of the Form Protective Agreement set forth in Attachment 5 to the Exhibit  
 D of this Agreement.

10.8.2.27.3 (omitted)

10.8.2.27.4 In all instances, CLEC will use agreement only for the following purposes: (a) to determine whether Qwest has ownership or control over ducts, conduits, or rights-of-way within the property described in the agreement and the scope of such ownership or control; (b) to determine the ownership of wire within the property described in the agreement; (c) to determine the demarcation point between Qwest facilities and the Owner's facilities in the property described in the agreement; (d) to determine the legal description of any property interest of a third-party owner, including any metes and bounds of the property; (e) to determine the term of the agreement; and (f) to determine the parties to the agreement. CLEC further agrees that CLEC shall not disclose the content, terms, or conditions of any agreement provided pursuant to section 10.8 to any CLEC agents, or employees engaged in sales, marketing or product management efforts on behalf of CLEC.

28. We acknowledge that currently there might exist agreements between Qwest and a building owner that contain confidentiality or nondisclosure provisions that would purport to prevent Qwest from providing the agreements to a third party. In these cases, we believe that first Qwest should attempt to obtain the building owner's consent to disclose. Qwest should be allowed to recover its reasonable costs, if any, of obtaining the building owner's consent. CLEC's should have the option of obtaining the consent themselves or entering into a protective order or indemnifying Qwest. We also believe that agreements that contain such confidentiality provisions have an anti-competitive effect, and that on a going-forward basis Qwest should not enter into ROW agreements containing provisions that prevent disclosure by Qwest. We concur with Staff and the CLECs that Qwest should make all agreements that do not contain confidentiality provisions available without requiring CLECs to obtain property-owner consent or entering into indemnification or protective agreements. Qwest should revise its SGAT and exhibits to reflect that it is the general rule that CLECs do not need to obtain building owner consent prior to obtaining copies of ROW agreements, but that if existing agreements contain confidentiality provisions that prevent Qwest disclosure, CLECS have the option of requesting Qwest to attempt to obtain owner consent to disclose, obtaining owner consent themselves, indemnifying Qwest, or entering into the protective agreement. We also require Qwest to revise its SGAT to preclude its entering into ROW agreements that contain such confidentiality provisions. We do not intend this prohibition to extend to appropriate proprietary financial and marketing terms of the landowner agreements.

29. The fourth supplemental impasse issue is whether Qwest's requirement that CLECs

1 obtain the agreement of the landowner to provide Qwest with notice and an opportunity to cure  
2 before Qwest will provide CLEC access to the ROW is lawful, necessary and/or burdensome.

3 30. In its Supplemental Report, Staff states that Qwest has agreed to eliminate this  
4 provision in its Consent regarding Access Agreement. According to Staff, Qwest has agreed to this  
5 change in the Multi-State proceeding and has submitted revisions to Section 10.8 and other  
6 provisions of Exhibit D to delete references to that form.

7 31. Qwest confirms that it has eliminated the subject provision from its Consent form.  
8 With Qwest's agreement, this impasse issue is closed.

9 32. The fifth impasse issue is whether there are circumstances under which Qwest may  
10 extend its 45 day deadline for responding to requests for access to Rights-of-Way.

11 33. The Joint Intervenors assert that the timeline Qwest proposes in its Arizona SGAT  
12 provides too much time for Qwest to respond to unusually large requests for access to poles, ducts,  
13 conduits and rights-or-way, and that FCC rules require Qwest to respond to a request, regardless of  
14 size without exception, in 45 days.

15 34. Qwest does not believe that the FCC's rules or decisions contemplate a blanket 45-day  
16 response time for large requests. Qwest argues such a blanket requirement is unreasonable because it  
17 is impossible to adequately and thoroughly respond to some large requests for access within 45 days.  
18 Nonetheless, Qwest has stated that it will amend its SGAT, consistent with the conclusions in the  
19 Multi-State workshop, to include a presumption that Qwest will respond to pole, conduit and right-of-  
20 way requests in 45 days. Qwest argues that if a CLEC submits an unusually large request for access,  
21 or legitimate circumstances prevent Qwest from meeting the 45-day deadline, Qwest should have the  
22 opportunity to seek a waiver. The proposed SGAT would permit Qwest to seek relief from that  
23 requirement on a case-by-case basis.

24 35. Staff agrees with the CLECs, relying on the FCC rules and orders that require a 45 day  
25 response time without any express exceptions. Staff recommends that Qwest modify its SGAT  
26 accordingly.



36. In the *Local Competition Reconsideration Order*,<sup>3</sup> the FCC held "because time is of the essence in access requests, a utility must respond to a written request for access within 45 days. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45<sup>th</sup> day." The FCC affirmed this Rule in *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, June 7, 2000. In *Cavalier*, the FCC was asked to address the numerous delays the complainant had suffered in obtaining the utility's approval to attach to its poles. The electric company had argued it was only required to respond within 45 if it were going to deny the application. The FCC directed the electric utility to provide immediate access to all poles for which permit applications had been pending for greater than 45 days. With respect to large orders, the FCC in *Cavalier* states:

We have interpreted the Commission's Rules, 47 CFR § 1.1403(b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted." We conclude that Respondent is required to act on each permit application submitted by Complainant within 45 days of receiving the request. To the extent that a permit application includes a large number of poles, respondent is required to approve access as the poles are approved, so that complainant is not required to wait until all poles included in a particular permit are approved prior to being granted any access at all.

FCC orders do not make a distinction based on the number of requests for access. Qwest cites no authority that would authorize its proposal.

37. In its November 15, 2001 Comments, Qwest agrees to adopt Staff's recommendation that the SGAT provide no exceptions to Qwest's obligation to respond to pole, conduit and right-of-way requests within 45 days.

38. With Qwest's concession to revise its SGAT, this impasse issue is resolved. We believe Staff's recommendation is consistent with FCC orders, is reasonable and should be adopted.

39. The parties have not identified any other impasse issues affecting Checklist Item No.

3.

### CONCLUSIONS OF LAW

<sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (Aug. 8, 1996).

1. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Commission has jurisdiction over Qwest.

2. The Commission, having reviewed the Supplemental Report on Qwest's Compliance with Checklist Item No. 3, dated November 5, 2001, and conditioned upon Qwest's satisfactory compliance with the findings adopted herein, and further subject to Qwest passing relevant performance measurements in the third-party OSS test, concludes that Qwest has met the requirements of Section 271 pertaining to Checklist Item No. 3, and the Commission hereby approves and adopts the Supplemental Report on Qwest's compliance with Checklist Item No. 3, as modified herein.

## ORDER

IT IS THEREFORE ORDERED that the Supplemental Report on Qwest's Compliance with Checklist Item No. 3, dated November 5, 2001, as modified herein, is adopted.

IT IS FURTHER ORDERED that Qwest Corporation shall file within 20 days of the effective date of this Order, a revised SGAT incorporating the Findings and Conclusions herein.

IT IS FURTHER ORDERED that CLECs and other interested parties shall have ten days following Qwest Corporation's filing of the revised SGAT to file written comments concerning the proposed SGAT language.



• • •

• • •

...

• • •

1 2 3

• • •

11

ii

100

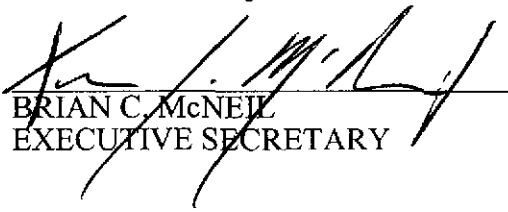
1 IT IS FURTHER ORDERED that Commission Staff shall file within twenty days of Qwest  
2 Corporation's filing, its recommendation to adopt or reject the proposed SGAT language and a  
3 procedural recommendation for resolving any remaining dispute.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

6   
7 CHAIRMAN  
8   
9 COMMISSIONER  
10   
11 COMMISSIONER

12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
13 Secretary of the Arizona Corporation Commission, have  
14 hereunto set my hand and caused the official seal of the  
15 Commission to be affixed at the Capitol, in the City of Phoenix,  
16 this 28<sup>th</sup> day of December, 2001.

17   
18 BRIAN C. McNEIL  
19 EXECUTIVE SECRETARY

20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

1 SERVICE LIST FOR:

U S WEST COMMUNICATIONS, INC. (SECTION  
271)

3 DOCKET NO.:

T-00000A-97-0238

4 QWEST Corporation  
1801 California Street, #5100  
5 Denver, Colorado 80202

Michael W. Patten  
ROSHKA HEYMAN & DEWULF  
400 E. Van Buren, Suite 800  
Phoenix, Arizona 85004

6 Maureen Arnold  
U S WEST Communications, Inc.  
3033 N. Third Street, Room 1010  
7 Phoenix, Arizona 85012

Charles Kallenbach  
AMERICAN COMMUNICATIONS SERVICES INC  
131 National Business Parkway  
Annapolis Junction, Maryland 20701

8 Michael M. Grant  
GALLAGHER AND KENNEDY  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225

Karen L. Clauson  
Thomas F. Dixon  
MCI TELECOMMUNICATIONS CORP  
707 17th Street, #3900  
Denver, Colorado 80202

9 Timothy Berg  
10 FENNEMORE CRAIG  
3003 N. Central Ave., Suite 2600  
Phoenix, Arizona 85016

Richard S. Wolters  
AT&T & TCG  
1875 Lawrence Street, Room 1575  
Denver, Colorado 80202

11 Mark Dioguardi  
12 TIFFANY AND BOSCO PA  
500 Dial Tower  
1850 N. Central Avenue  
13 Phoenix, Arizona 85004

Joyce Hundley  
UNITED STATES DEPARTMENT OF JUSTICE  
Antitrust Division  
1401 H Street NW, Suite 8000  
Washington, DC 20530

14 Nigel Bates  
ELECTRIC LIGHTWAVE, INC.  
4400 NE 77th Avenue  
15 Vancouver, Washington 98662

Joan Burke  
OSBORN MALEDON  
2929 N. Central Avenue, 21st Floor  
P.O. Box 36379  
Phoenix, Arizona 85067-6379

16 Thomas L. Mumaw  
Jeffrey W. Crockett  
SNELL & WILMER  
One Arizona Center  
17 Phoenix, Arizona 85004-0001

Scott S. Wakefield, Chief Counsel  
RUCO  
2828 N. Central Avenue, Suite 1200  
Phoenix, Arizona 85004

18 Darren S. Weingard  
Stephen H. Kukta  
19 SPRINT COMMUNICATIONS CO L.P.  
1850 Gateway Drive, 7th Floor  
20 San Mateo, California 94404-2467

Lyndon J. Godfrey  
Patricia L. vanMidde  
AT&T  
111 West Monroe, Suite 1201  
Phoenix, Arizona 85003

21 Thomas H. Campbell  
LEWIS & ROCA  
40 N. Central Avenue  
22 Phoenix, Arizona 85007

Daniel Waggoner  
DAVIS WRIGHT TREMAINE  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688

23 Andrew O. Isar  
TRI  
4312 92nd Avenue, N.W.  
Gig Harbor, Washington 98335

Douglas Hsiao  
Jim Scheltema  
Blumenfeld & Cohen  
1625 Massachusetts Ave. N.W., Suite 300  
Washington, DC 20036

24 Bradley Carroll  
25 Cox Arizona Telcom, L.L.C.  
1550 West Deer Valley Road  
Phoenix, Arizona 85027

Raymond S. Heyman  
Randall H. Warner  
ROSHKA HEYMAN & DeWULF  
400 E. Van Buren, Suite 800  
Phoenix, Arizona 85004

26 Richard M. Rindler  
Morton J. Posner  
27 SWIDER & BERLIN  
3000 K Street, N.W. Suite 300  
28 Washington, DC 20007

- 1 Diane Bacon, Legislative Director  
COMMUNICATIONS WORKERS OF AMERICA  
5818 North 7<sup>th</sup> Street, Suite 206
- 2 Phoenix, Arizona 85014-5811
- 3 Mark N. Rogers  
Excell Agent Services, L.L.C.  
2175 W. 14<sup>th</sup> Street
- 4 Tempe, Arizona 85281
- 5 Robert S. Tanner  
DAVIS WRIGHT TREMAINE LLP  
17203 n. 42<sup>ND</sup> Street
- 6 Phoenix, Arizona 85032
- 7 Mark P. Trinchero  
DAVIS WRIGHT TREMAINE LLP  
1300 S.W. Fifth Avenue, Suite 2300
- 8 Portland, Oregon 97201
- 9 Jon Loehman  
Managing Director-Regulatory  
SBC Telecom, Inc.  
5800 Northwest Parkway
- 10 Suite 135, Room 1.S.40  
San Antonio, Texas 78249
- 11 Lyndall Nipps  
Director, Regulatory  
Allegiance Telecom, Inc.  
845 Camino Sure
- 12 Palm Springs, California 92262
- 13 M. Andrew Andrade  
5261 S. Quebec Street, Suite 150  
Greenwood Village, CO 80111
- 14 Attorney for TESS Communications, Inc.
- 15 Todd C. Wiley  
GALLAGHER & KENNEDY  
2575 E. Camelback Road
- 16 Phoenix, Arizona 85016-9225
- 17 Laura Izon  
COVAD COMMUNICATIONS CO  
4250 Burton Street
- 18 Santa Clara, California 95054
- 19 Al Sterman  
ARIZONA CONSUMERS COUNCIL  
2849 E 8th Street
- 20 Tucson Arizona 85716
- 21 Brian Thomas  
TIME WARNER TELECOM, INC.  
520 S.W. 6<sup>th</sup> Avenue, Suite 300
- 22 Portland, Oregon 97204
- 23 Christopher Kempley, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street
- 24 Phoenix, Arizona 85007
- 25 Ernest G. Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street
- 26 Phoenix, Arizona 85007
- 27
- 28

**IN THE MATTER OF QWEST CORPORATION'S  
SECTION 271 APPLICATION**

**ACC Docket No. T-00000A-97-0238**

**SUPPLEMENTAL REPORT ON QWEST'S COMPLIANCE**

**With**

**CHECKLIST ITEM: NO. 3 - POLES, DUCTS, CONDUITS  
AND RIGHTS-OF-WAY**

**NOVEMBER 5, 2001**

**DECISION NO. 64300**

## I. FINDINGS OF FACT

### A. PROCEDURAL HISTORY

1. On March 9, 2001 in Decision No. 63419, the Arizona Corporation Commission approved Checklist Item 3 - Poles, Ducts, Conduits and Rights-of-Way.

2. In the Conclusions of Law portion of the approved Order, Qwest<sup>1</sup> was required to update its SGAT language agreed to in other region Workshops and resolution by the Hearing Division /Commission of the issue of how to treat issues arising in other State Workshops which the parties would like to bring back to Arizona after the record has closed.

3. On March 26, 2001, the Hearing Division of the Commission issued a procedural order indicating that a party may request to supplement the record in Arizona on a checklist item by filing a brief within 10 business days from the date the issue is first declared at impasse in another jurisdiction. Other parties were ordered to file replies to the request within 7 business days, and Staff shall file a report, including its procedural and substantive recommendations for the resolution for the dispute.

4. On April 9, 2001, AT&T Communications of the Mountain States, Inc. ("AT&T") and WorldCom, Inc. ("MCIW") (collectively referred to herein as "Joint Intervenor") filed a request to supplement the record regarding checklist items 3, 7 and 10 with disputed issues raised in other Region workshops.

5. The following issues have been disputed by AT&T and MCIW - access to private landowner/property owner agreements, time for responding to rights-of-way ("ROW") access requests, definitions of ROW and "ownership and control".

### B. DISCUSSION

#### 1. Checklist Item No. 3

##### a. Background

6. Section 271(c)(2)(B)(iii) of the Telecommunications Act of 1996 requires a 271 applicant to provide or offer to provide: "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

<sup>1</sup> As of the date of this Report, U S WEST has merged with Qwest Corporation, which merger was approved by the Arizona Commission on June 30, 2000. For purposes of this Report, all references to U S WEST have been changed to Qwest.

7. In the *Local Competition First Report and Order*, the FCC interpreted Section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of Section 224.

8. Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

9. Notwithstanding this requirement, Section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

10. Section 224(b)(1) authorizes the FCC to regulate the rates, terms, and conditions for pole attachments to ensure that such rates, terms and conditions are reasonable. Under Section 224(c)(1) the FCC's jurisdiction does not extend to rates terms or conditions or access to poles, ducts, conduits and rights-of-way in any case where such matters are regulated by a State.

11. Pursuant to Section 224(e)(1), the FCC was required within 2 years of the date of enactment of the 1996 Act, to prescribe regulations to implement the provisions of the Act dealing with charges for pole attachments used by telecommunications carriers to provide telecommunications services to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.

12. The FCC interpreted the requirements of Section 224 governing rates, terms, and conditions for telecommunications carriers' attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.<sup>2</sup>

13. In its *Local Competition First Report and Order*<sup>3</sup>, the FCC established five rules of general applicability concerning poles, ducts, conduits, and rights-of-way. First, in evaluating a request for access a utility may continue to rely on such codes as the National Electrical Safety Code ("NESC") to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Second, Federal requirements, such as those imposed by the Federal Energy Regulatory Commission ("FERC") and the Occupational Safety and Health Administration ("OSHA") will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under Section 224(f)(1). Third, the FCC considers State and local requirements affecting pole attachments. Fourth, where access is mandated, the rates, terms, and conditions of

<sup>2</sup> *In the Matter of Implementation of Section 703(E) of the Telecommunications act of 1996*, 13 FCC Rcd. 6777 (rel. February 6, 1998) ("Pole Attachment Telecommunications Rate Order").

<sup>3</sup> *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996), vacated in part and aff'd in part sub nom. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), overruled in part, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).



access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the FCC formula. Fifth, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services. *Local Competition First Report and Order* at paras. 1151-1153; 1156 and 1157.

14. The FCC in the *BellSouth Louisiana II Order*<sup>4</sup> specified four elements for establishing a prima facie case for Checklist Item 3:

- a. Evaluating facility requests pursuant to Section 224 of the Act and the *Local Competition First Report and Order*,
- b. Granting competitors nondiscriminatory access to information or facilities availability,
- c. Permitting competitors to use non-[RBOC] workers, and
- d. Compliance with State and Federal rates.

## b. CLEC Position

### 1. Definition of "Ownership and Control"

15. Joint Intervenor argue that Qwest has proposed new definitions of "ROW" and "ownership and control" which are contrary to law and inappropriate.<sup>5</sup> Id. at p. 5. Although Joint Intervenor still have a concern over Section 10.8.1.5 wherein the phrase "ownership or control to do so" means the legal right, as a matter of state law, to "convey an interest in real or personal property", with minor modifications this section would be acceptable. Id. at p. 18. Section 10.8.1.5 as revised and proposed by the Joint Intervenor would read as follows:

10.8.1.5 The phrase "ownership or control to do so" means the legal right, as a matter of state law, to convey an interest in real or personal property or to afford the access to poles, ducts, conduits and rights-of-way contemplated by the Act

Id. at p. 19. The recent Multi-state Order also reflects a revised version of Section 10.8.1.5 that is consistent with AT&T's proposal. Id.

<sup>4</sup> Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended to Provide In-Region InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998) ("*BellSouth Second Louisiana Order*").

<sup>5</sup> AT&T's and WComs's April 6, 2001 Request to Supplement The Record Regarding Checklist Item 3, 7 and 10.

## 2. Definition of "Rights of Way" - ROW

16. Second, Joint Intervenor state that Qwest proposed revisions to various sub-sections of SGAT Section 10 which defines Rights of Way ("ROW") in a manner which is inconsistent with the FCC's *MTE Order*. *Id.* at p. 17. Specifically, Section 10.8.1.3.1 was revised to state:

10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

*Id.* at p. 17-18. ROW, as contemplated by the Act and the FCC is not limited to "real property interests", as Qwest defines that term. *Id.* Also, Qwest's definition of ROW in an MDU context is not consistent with the FCC *MTE Order*. *Id.*

## 3. Access to MDU Agreements

17. In the Colorado workshop on Checklist Item 3, an issue arose concerning Qwest's provisioning of nondiscriminatory access to ROW. CLECs have disputed Qwest's claim that the agreements Qwest has entered into with private landowners, at least in the multiple dwelling unit ("MDU") context, do not convey ROW and, therefore, Qwest has no obligation to satisfy under Section 251 (b)(4). *Id.* at p. 2. CLECs stated that access to these agreements with private landowners/property owners are vital to ascertaining what ROW Qwest owns or controls and the terms and conditions upon which Qwest has been afforded access. *Id.* at p. 3.

18. The Joint Intervenor contend that access to these agreements is an integral component of Qwest's compliance with Section 271 (c)(2)(B)(iii) and that the disputed issues that remain relating to such access must be considered and resolved before Qwest can be deemed to be in compliance with Checklist Item 3. *Id.*

19. In Colorado, it was agreed that CLECs would execute an Access Agreement (in lieu of the Quitclaim that is now appended to the Arizona SGAT of the record that was filed on July 21, 2000), although the precise content of the Access Agreement was not fully resolved. *Id.* at p. 3-4. In the Arizona SGAT, Qwest did not include any of the language relating to this Access Agreement. *Id.* Reference to the Access Agreement was included into the Multi-state SGAT filed by Qwest and should be incorporated into the Arizona SGAT. *Id.*

20. There are several disputed issues with respect to the Access Agreement. Id. at p. 4. While Qwest has agreed to provide CLECs with all copies of its ROW and MDU agreements, Qwest seeks to impose significant conditions that the CLECs must comply with before such agreements will be provided. Id. Qwest has proposed terms and conditions in the Access Agreement that require CLECs to go through the unnecessary and burdensome effort of gaining 1) the landowner's consent before access to the agreements will be afforded, in cases where the underlying agreement has not been recorded and 2) the landowner's agreement to provide notice and opportunity to cure before Qwest will afford CLECs access to ROW agreements. Id. at p. 4-5. These issues have gone to impasse in Colorado, Washington, Oregon and the Multi-state workshops. Id.

21. Qwest proposes to provide a copy of any ROW agreement in its possession that has not been recorded only after a CLEC has obtained the consent of the landowner to the disclosure of the ROW agreement. Id. at p. 8. CLECs argue that this consent requirement is not required by the law and is inconsistent with sound public policy. Id. Also, since such consent is not required of Qwest itself, or its affiliates, Qwest's consent proposals for CLECs are discriminatory, in violation of both state and federal law. Id. CLECs further argued that it would create unreasonable costs and impose significant delays on CLEC access to ROW and provisioning of service using such ROW, which would constitute a significant barrier to offering the tenants or other customers a competitive alternative. Id.

22. ROW agreements presented to CLECs in the workshops (including Qwest's own Agreement for New Multi-Tenant Residential Properties) do not explicitly require consent to the disclosure of the terms of the agreement to third parties, and do not explicitly require written and acknowledged prior consent. Id. at p. 8-9. Qwest's form agreement contains a restriction on assignment that prohibits the landowner, not Qwest, from assigning the contract. Id. Qwest's Form Agreement for New Multi-Tenant Residential Properties contains a provision that requires the landowner, not Qwest, to notify Qwest of a transfer of the subject property. Id. These agreements clearly contemplate that Qwest may assign ROW access without restraint. Id.

23. These agreements do not contain nondisclosure requirements. Id. at p. 9. Qwest's proposal creates a presumption that all such ROW agreements are confidential and subject to a prohibition against disclosure, which is inappropriate and imposes a needless burden on CLECs to obtain disclosure. Id.

24. Finally, Qwest's proposal does not address the issue of Qwest's obligation with respect to future ROW agreements. Id. at p. 10. In future ROW agreements that Qwest enters into, Qwest must be required to obtain a contractual provision that affirmatively allows the disclosure of these agreements to third parties without prior written consent. Id.

#### 4. Cure of CLEC breaches

25. Qwest's requirement that CLECs obtain the agreement of the landowner to provide Qwest with notice and an opportunity to cure is unlawful, unnecessary and burdensome. *Id.* at p. 10. The law does not mandate that CLECs obtain an agreement from the landowner to provide Qwest with notice and opportunity to cure before Qwest must provide access. *Id.* at p. 11. Neither the Act nor the FCC's rules and orders impose any requirement for a CLEC to obtain the agreement of a landowner to provide notice and an opportunity to cure to Qwest or further agreement of a landowner for access to rights of way. *Id.* While Qwest asserts that this notice and opportunity to cure is required to protect Qwest's interests, CLECs state that there are numerous indemnification and liability provisions in the SGAT to protect Qwest in the event a CLEC acts or fails in a way that exposes Qwest to liability. *Id.* at p. 11-12.

26. Where Qwest demonstrates that certain ROW agreements expressly provide for obtaining the agreement of the landowner to provide notice and an opportunity to cure before permitting "assignment" or other transfer, the Joint Intervenors would not object to inclusion in the SGAT certain limited and reasonable provisions designed to obtain and expedite such landowner agreement wherever necessary. *Id.* However, such provisions must not be burdensome and must ensure that Qwest does not use its incumbent status to impose such landowner agreement requirements on landowners. *Id.* at p. 12-13.

27. CLECs also state that Qwest's consent and notice and opportunity to cure proposals are discriminatory because Qwest requires a CLEC to comply with obligations that are more burdensome to CLECs than to itself. *Id.* at p. 13.

28. Additionally, Qwest's argument ignores the fact that CLECs are similarly at risk of a "default" under ROW agreement by Qwest. *Id.* at p. 13. Qwest deems it unnecessary to require the agreement of the landowner to provide notice and opportunity to cure to the CLEC, nor does Qwest deem it necessary to expressly agree that CLEC can perform under the ROW agreement in the event of Qwest's default. *Id.* Qwest's proposal does not afford a CLEC any protection and such a proposal is discriminatory. *Id.*

29. Joint Intervenors stated that in the preliminary rulings on these issues, the administrative law judges in Washington and Oregon have both considered and rejected Qwest's requirements that CLECs obtain landowner consent before access to ROW and MDU agreements will be afforded. *Id.* at p. 14. For the same reasons as specified by these rulings, the Arizona Corporation Commission should reject Qwest's proposed consent and notice and opportunity to cure requirements and direct Qwest to provide CLECs with full and unconditional access to its ROW and MDU agreements. *Id.* at p. 17.

## 5. Large Request Response Time

30. Qwest seeks to limit its obligation to respond to requests for access to ROW beyond the 45-day time frame established by the FCC. *Id.* at p. 5. Joint Intervenor argued that Qwest must be required to grant or deny all requests for access to poles, ducts and rights-of-way within 45 days of the receipt of the request in order for the SGAT to be lawful. *Id.* at p. 20. In Section 10.8.4 of the SGAT, Qwest has proposed timelines for responding for requests for access to ROW that are contrary to the 45-day response established by the FCC. *Id.* In the SGAT filed in Arizona, Qwest proposes that it be permitted for large ROW requests to provide an initial response approving or denying a portion of the order no later than 35 days following receipt of the order and continue approval or denial on a rolling basis until it has completed its response to such order. *Id.* This proposal is contrary to law. *Id.* Under the Act, the FCC rules and relevant orders of the FCC, Qwest is required to respond to all requests for access to poles, ducts ROW within 45 days, and there is no basis for excepting large requests from any other request for access to poles, ducts, conduit or ROW. *Id.* Qwest's SGAT must be modified to require responses to all requests for access to poles, ducts and ROW within 45 days consistent with FCC Rule 1.1403. *Id.* at p. 21. Again, the administrative law judges in Washington and Oregon have considered and rejected Qwest's SGAT Section 10.8.4 and have enforced the 45-day response time found in the FCC Rule. *Id.* at p. 23. The Arizona Commission should reject Qwest's effort to alter its clear obligation under FCC Rules and Orders and direct Qwest to revise its SGAT to require it to respond to request for access by approving or denying such requests within 45 days of receipt of the request. *Id.* at p. 26.

### c. Qwest Response<sup>6</sup>

#### 1. Definition of "Ownership and Control"

31. The Joint Intervenor state that Qwest's definition of "ownership and control" is inappropriate and that the proper function of this definition is to determine whether Qwest has "ownership and control" to afford the Joint Intervenor access to Qwest's right-of-way, easement or other interest in property. *Id.* at p. 2. The Facilitator in the Multi-State proceeding struck a reasonable compromise on this issue that contains aspects of both the Qwest and AT&T proposed language. *Id.* at p. 3. The Facilitator determined that the SGAT should reflect instances in which "ownership or control" arises "by implication" under state law, and that the definition should not necessarily be based on Qwest's ability to receive compensation for providing access. *Id.* It was also determined that AT&T's proposed definition, also proposed in the Request to Supplement the Record, was too broad because it ignored that Qwest's access rights are defined by state law. *Id.*

<sup>6</sup> Qwest's April 17, 2001 Response to AT&T's and WorldCom's Request to Supplement the Record Regarding Checklist Items 3, 7, and 10.

32. Qwest has agreed to implement the Facilitator's recommendation in the Multi-State proceeding, and neither Joint Intervenor opposes that language. *Id.* at p. 3. To resolve this issue in Arizona, Qwest will also agree to include the same language so long as no other Arizona CLEC objects. *Id.* Staff believes that this is a reasonable compromise and recommends adoption of the Multi-State recommendation.

## 2. Definition of "Rights of Way" - ROW

33. The Joint Intervenor's oppose the definition of right-of-way that Qwest proposed in the Multi-State proceeding in Section 10.8.1.3.1. *Id.* at p. 4. They claim, without any discussion or citation to a paragraph, that a ROW is not limited to "real property interests, as Qwest defines that term" and that the definition is somehow "not consistent" with the FCC's *MTE Order*. *Id.* Joint Intervenor's later seem to acknowledge the validity of Qwest's definition of a ROW when they state that "the ownership or control analysis that must be conducted under State law is to determine Qwest's ownership or control to afford the CLEC access to its *right-of-way, easement or other interest in property*". *Id.* Joint Intervenor's cryptic opposition to the definition of a ROW, which fails to cite any legal authority in support, does not meet their burden of proving that Qwest's Multi-State definition affects Qwest's compliance with Sections 251 and 271. *Id.*

## 3. Access to MDU Agreements

34. Qwest argued that there are two issues that are in dispute. First, even though it disagrees that the MDU agreements at issue convey a ROW, Qwest has agreed in other States to provide CLECs with copies of MDU access and ROW agreements Qwest has entered into with third-party property owners that convey a right of access to Qwest so that CLECs may determine if Qwest has access rights it may convey. *Id.* at p. 5. The Joint Intervenor's and Qwest disagree on whether a CLEC should be required to obtain the consent of the third-party property owner prior to Qwest's disclosure of non-recorded agreements, principally MDU agreements, and disagree on the uses to which those agreements could be put by the CLEC. *Id.*

35. On March 5, 2001, Qwest submitted a proposal in the subloop workshop that permits CLECs to obtain MDU agreements (with landowner consent) so long as the CLEC uses the agreements to make certain Checklist Item 3/subloop determinations and does not disclose the agreements to its marketing, sales, or product management personnel. *Id.* at p. 5.

## 4. Cure of CLEC breaches

36. Qwest proposed that CLECs obtain a landowner's consent to Qwest's notice of opportunity to cure defaults by CLECs or possible breaches by CLECs of the underlying right-of-way agreements as a condition of obtaining access to the right-of-way over which Qwest has ownership or control. *Id.* at p. 9. The Joint Intervenor's state that obtaining this notice and opportunity to cure is too burdensome for CLECs. *Id.*

Although Qwest disagrees with Joint Intervenor's claims, Qwest will delete the Consent Regarding Access Agreement form in Exhibit D that contained the notice and cure obligations. *Id.* Qwest has agreed to this change in the Multi-State proceeding and submitted revisions to Section 10.8 and other provisions of Exhibit D to delete references to that form. *Id.*

## 5. Large Request Response Time

38. The Joint Intervenor's state that the timeline Qwest proposed in its Arizona SGAT provides too much time for Qwest to respond to unusually large requests for access to poles, ducts, conduits, and rights-of-way and that FCC rules required Qwest to respond to a request, regardless the size and without exception, in 45 days. *Id.* at p. 10. Qwest does not believe a blanket 45 day response time for large requests is contemplated by the FCC's rules or decisions and moreover, such a blanket requirement is unreasonable because it is simply impossible to adequately and thoroughly respond to some large requests for access within 45 days. *Id.*

39. However, if the Commission believes that the schedule Qwest and Joint Intervenor's negotiated is insufficient to demonstrate Qwest's compliance with Checklist Item 3, as an accommodation to the Joint Intervenor's, Qwest will agree to amend the SGAT, consistent the conclusions reached in the Multi-State workshop, to include a presumption that Qwest will respond to pole, conduit, and right-of-way requests in 45 days. *Id.* The SGAT will permit Qwest to seek relief from that requirement on a case-by-case basis. *Id.*

40. In the Multi-State proceeding, AT&T still opposes this resolution, apparently asserting that there should be no exception to the 45-day rule. *Id.* at p. 11. Neither FCC rules nor the SGAT should require the impossible. If a CLEC submits a unusually large request for access, or legitimate circumstances prevent Qwest's meeting the 45-day deadline, Qwest should be given the opportunity to seek a waiver. *Id.* Since Qwest will have the burden of justifying the waiver, the Commission should accept this resolution as fully consistent with Qwest's Checklist Item 3 obligations.

## e. Discussion and Staff Recommendations

### 1. Definition of "Ownership and Control"

41. With respect to the definition of "ownership and control", Qwest has agreed to implement the Facilitator's recommendation in the Multi-State proceeding, which Qwest claims neither Joint Intervenor opposes. Qwest states that its proposed definition was taken from the FCC's *Local Competition Order*<sup>5</sup> and its recent order on access to multi-tenant environments that is very similar to what AT&T seeks herein. While AT&T opposed this language according to Qwest, the recent Multi-State Order

<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (Aug. 8, 1996) ("Local Competition Order").

reflects a revised version of Section 10.8.1.5 to which neither AT&T or WorldCom objected. The revised Section 10.8.1.5 reads as follows:

The phrase "ownership or control to do so" means the legal right, as a matter of state law, to (i) convey an interest in real or personal property, or (ii) afford access to third parties as may be provided by the landowner to Qwest through express or implied agreements, or through Applicable Rules as defined in this Agreement.

42. Staff has reviewed the language and finds it acceptable and to be a reasonable compromise between the language proposed by the Joint Intervenor and Qwest. Further, given Qwest's representation that no CLEC objects to this language, Staff recommends its adoption in Arizona. Further, to the extent there are other conforming amendments that need to be made to other provisions of Section 10 of the SGAT (Attachment 2 to Qwest's Response to AT&T and WorldCom's Request to Supplement the Record, Staff recommends that Qwest be required to include those as well. Finally, Staff recommends that Qwest be required to submit all of its revised SGAT language for review by the parties before it is approved.

## 2. Definition of "Rights of Way" – ROW

43. With respect to the definition of ROW, the Joint Intervenor oppose the definition of ROW that Qwest proposed in the Multi-State proceeding in Section 10.8.1.3.1. The Joint Intervenor argue that a ROW is not limited to "real property interests, as Qwest defines that term" and that the definition is "not consistent" with the FCC's *MTE Order*.

44. Qwest claims that the definition it proposed in the Multi-State proceedings draws almost verbatim from paragraph 82 of the *MTE Order*. Qwest further states that there has been no evidence provided by Joint Intervenor which would indicate that Qwest's proposed language is inconsistent with its obligations under Sections 251 and 271 of the 1996 Act.

45. Staff has reviewed Qwest's proposed language changes to Sections 10.8.1.3, 10.8.1.3.1, 10.8.1.2.1 and 10.8.1.3.1 set forth on page 23 of the Multi-State Facilitator's March 19, 2001 Report and believes that the changes proposed by Qwest should satisfy AT&T's concerns with the two additions which Staff has added in bold print. The revisions read as follows:

10.8.1.3 Rights of Way (ROW) – Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above,



across, along or through public or private property or enter multi-unit buildings.

10.8.1.3.1 ROW means access to private property owned or controlled by Qwest, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings.

10.8.1.2.1 The terms Duct and Conduit mean a single enclosed raceway for conductors, cable and/or wire. Duct and Conduit may be in the ground, may follow streets, bridges, public or private ROW or may be within some portion of a multi-unit building. Within a multi-unit building, duct and conduit may traverse building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets or building riser. The terms Duct and conduit include riser conduit.

10.8.1.3.1 ROW means access to private property owned or controlled by Qwest, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

46. Staff recommends that Qwest be required to modify Section 10 of its SGAT as set forth above. Staff recommends that Qwest be required to make conforming amendments to other Sections of the SGAT as necessary. Finally, Staff recommends that Qwest be required to submit any proposed SGAT language to the parties for review prior to its approval.

### **3. Access to MDU Agreements**

47. With respect to access to MDU and other landowner agreements, on March 5, 2001, Qwest submitted a proposal in the subloop workshop that permits CLECs to obtain MDU agreements (with landowner consent) so long as the CLEC uses the

DECISION NO. 64300

agreements to make certain Checklist Item 3/subloop determinations and does not disclose the agreements to its marketing, sales, or product management personnel.

48. Staff agrees with the Seven-State Facilitator that "[i]t is evident why a CLLC should be allowed an independent determination of those rights, and why it should have access to these agreements." See March 19, 2001 Multi-State Report, at p. 21. Staff, however, believes requiring the CLECs to obtain approval of the landowner in all instances before the CLEC may obtain a copy of the underlying right of way or other landowner agreement is an unreasonable burden on the CLEC. Qwest should be required to eliminate the requirement for prior landowner approval before disclosure of underlying landowner/right of way agreements.

#### 4. Cure of CLEC Breaches

49. Regarding cure of CLEC breaches, Qwest has agreed to delete the Consent Regarding Access Agreement form in Exhibit D that contained the notice and cure obligations. Qwest has agreed to this change in the Multi-State proceeding and submitted revisions to Section 10.8 and other provisions of Exhibit D to delete references to that form. With that change proposed by Qwest, Staff considers this issue now closed.

#### 5. Large Request Response Times

50. Regarding AT&T's and MCIW's concern that the timeline Qwest proposed in its Arizona SGAT provides too much time for Qwest to respond to unusually large requests for access to poles, ducts, conduits, and rights-of-way, Qwest has agreed to amend the SGAT, consistent the conclusions reached in the Multi-State workshop, to include a presumption that Qwest will respond to pole, conduit, and right-of-way requests in 45 days. *Id.* The SGAT will permit Qwest to seek relief from that requirement on a case-by-case basis. AT&T opposes this resolution.

51. Staff agrees with the CLECs. The FCC's rule and orders require a 45 day response period without any express exceptions. Particularly persuasive is the FCC's decision in the *Cavalier Telephone Company* case. In that case, the FCC's decision is clear that the number of poles requested does not alter the requirement to grant or deny access to poles, ducts or rights-of-way within 45 days. *Cavalier Telephone* at para. 15.

52. Staff recommends that Qwest be required to modify its SGAT to be consistent with the above resolution. Staff recommends that Qwest be required to submit its revised SGAT to all parties for review prior to approval.

## II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

DECISION NO. 64300

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271(c)(2)(B), the Competitive Checklist.

7. Checklist Item No. 3 requires Qwest to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

8. Qwest's provision of access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224 is no longer subject to dispute.

9. Based upon the testimony, comment and exhibits submitted, Qwest complies with the requirements of Checklist Item No. 3.